IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

MATTHEW W. ARMSTRONG, Plaintiff,	)	Civil Action No. 5:16-cv-00053
v.	)	REPORT & RECOMMENDATION
JAMES MADISON UNIVERSITY, *et al.*, Defendants.	)	By: Joel C. Hoppe United States Magistrate Judge

Plaintiff Matthew W. Armstrong, proceeding pro se, brought this action against Defendants James Madison University ("JMU"), Erica Estes, Meghan C. Calabro, Amy M. Sirocky-Meck, Robert M. Golson, Eric C. Nickel, Steve Bobbitt, James Robinson, and Jennifer Phillips. Compl., ECF No. 1. He alleges violations of his rights under the United States Constitution, pursuant to 42 U.S.C. § 1983, along with violations of Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. §§ 1681–1688, and a host of other federal and state statutes, provisions of the Constitution of Virginia, and common law torts. Pending before the Court are the Defendants' motions to dismiss. ECF Nos. 7, 11. In his response to the Defendants' motions, Armstrong has also moved for discovery. Pl. Br. 14–16, ECF No. 17.[1] These motions are before me by referral under 28 U.S.C. § 636(b)(1)(A)–(B). ECF No. 15. All parties have fully briefed the issues, I have heard oral argument, and the motions are ripe for decision. After considering the pleadings, the parties' briefs and oral arguments, and the applicable law, I find that Armstrong has failed to state a claim that entitles him to relief and therefore recommend that the presiding District Judge grant the Defendants' motions to dismiss. In addition, Armstrong's motion for discovery is denied.

[1] During the hearing on the motions to dismiss, the Court denied Armstrong's request for appointment of counsel and request to prohibit the Office of the Attorney General of Virginia from representing the Defendants.

I. Factual Allegations and Claims

When assessing factual allegations on a motion to dismiss, I must view all well-pled facts in the complaint in the light most favorable to the plaintiff. *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009). In recognition of Armstrong's pro se status and my obligation to hold his pleadings to "less stringent standards than formal pleadings drafted by lawyers," *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam), I also will consider facts presented in his brief in opposition. *Shomo v. Apple, Inc.*, No. 7:14cv40, 2015 WL 777620, at *2 (W.D. Va. Feb. 24, 2015) (considering "both the complaint and the factual allegations in Shomo's response to the motion to dismiss in determining whether his claims can survive dismissal"); *Christmas v. Arc of the Piedmont, Inc.*, No. 3:12cv8, 2012 WL 2905584, at *1 (W.D. Va. July 16, 2012) (accepting as true facts from a pro se plaintiff's complaint and brief in opposition to decide a motion to dismiss).[2]

This case arises from an incident that occurred at JMU's University Recreation ("UREC") gym. Armstrong, a JMU graduate, held an alumnus membership at UREC. Compl. 45.[3] On March 3, 2016, while exercising at UREC, Armstrong struck up a conversation with Calabro, a student-employee there. *Id.* Armstrong claims that he had spoken with Calabro several times before and that their interactions had been pleasant. *Id.* He had grown attracted to her and interpreted her friendliness on prior occasions as a sign that she reciprocated these feelings, or at least was not bothered by his attention. *Id.* On this occasion, Armstrong spoke to Calabro about his religious beliefs, which he claims "allowed me to have a young wife, even though I was an

[2] In light of this standard, I must reject the Defendants' request to strike new allegations raised in Armstrong's brief and the exhibits attached thereto. *See* Defs. Reply Br. 1–2, ECF No. 18.

[3] Citations to the parties' filings will refer to the page number found in the ECF stamp at the bottom of each document.

older man." *Id.*[4] He then asked her, "Would you be interested in communicating, in getting to know each other better, with the eventual possibility of marriage? Would you think about it?" *Id.* After asking this, Armstrong returned to his workout. *Id.*[5]

The following day, Armstrong received an email from Golson, the Associate Director of Facilities and Operations at UREC, explaining that he had suspended Armstrong's UREC membership following a complaint of sexual harassment. *Id.* Armstrong was instructed to arrange an appointment with Robinson, JMU's Director of Equal Employment Opportunity and Title IX Administrator, and he met with Robinson on March 9 to discuss his interaction with Calabro. *Id.* at 45–46. Armstrong describes this meeting as brief and agreeable. *Id.* at 46. He claims Robinson told him that Calabro had given a description of events that corroborated his own. *Id.* He also alleges that Robinson agreed with him that Calabro had overreacted to his advances and that Robinson would inform Golson that no sexual misconduct took place. *Id.* Armstrong returned to UREC a few days later, expecting his membership to be restored, but instead found that it was still suspended. *Id.* He attempted to reach out to Robinson and Golson, but received no reply. *Id.* Finally, on March 30, Golson emailed Armstrong to notify him that his membership had been permanently revoked. *Id.*

Armstrong filed his own Title IX complaint with JMU's Office of Equal Opportunity ("OEO") on March 4 (the same day he was initially contacted by Golson), complaining that Calabro's reporting of his conduct amounted to discrimination and sexual harassment against him. *Id.* at 47. He did not receive a response for some time, which he attributes to deliberate obstruction on the part of OEO officials, including Robinson. *Id.* In fact, Robinson contacted

[4] Armstrong is sixty-five years old and states that his primary career is in Christian ministry. *Id.* at 45–46.

[5] Armstrong provides no further description of Calabro's reaction to this proposal, and he does not state whether they spoke again before he left.

Armstrong later that month, stating that he had heard about Armstrong's complaint, but had not received it. *Id.* Armstrong does not indicate that he pursued this complaint any further.

Following his expulsion from UREC, Armstrong obtained documents relating to the investigation of the incident through a Freedom of Information Act ("FOIA") request. *Id.* at 46. The documents, which Armstrong attached to his brief, Pl. Br. ex. 1, ECF No. 17-1, include complaints against Armstrong made by Calabro and Estes, Calabro's supervisor and a former student-employee of UREC, as well as communications among the Defendants pertaining to the investigation.[6] Armstrong contends, based on the contents of these documents, that the Defendants—primarily Calabro, Estes, and Robinson—exaggerated or fabricated details of their interactions with him, and he further alleges that the other Defendants, all officials involved in the adjudication of his claim, "rubber-stamped" these distortions in carrying out their investigation and disciplinary action. Compl. 46–47. Armstrong does not dispute the authenticity of these documents, and so the Court will consider them in evaluating his Complaint, but will not construe the assertions contained therein as true except to the extent they are adopted by the Complaint. *See Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 167 (4th Cir. 2016).

The FOIA documents include an email from Calabro to Golson, dated March 4, in which Calabro describes the history of her interactions with Armstrong, including their conversation the previous day. Pl. Br. ex. 1, at 20. Calabro explained that on prior occasions, Armstrong had made comments saying he "wished he had a nice girlfriend like [her]," but that she did not feel uncomfortable from these comments and usually just laughed and walked away. *Id.* She stated that their March 3 interaction had been much more uncomfortable, however, as Armstrong told

[6] Although the names of the complainants and the accused are redacted from most of these documents, Armstrong attributes the accusations to Calabro and Estes, and he does not dispute that he is the subject of the complaints. Thus, this Report and Recommendation will defer to Armstrong's allegations concerning the identities of the redacted parties to the extent such a reading is reasonable.

her that "he wished he had a large picture of [her] to hang up in his house," and after she had walked away, approached her again and asked for her opinion about "a man who could offer [her] millions of dollars, a farm, and to have as many babies as [she'd] like." *Id.* She alleged Armstrong told her that the Bible did not speak against age differences, which prompted her to voice her disinterest. *Id.* She then claims Armstrong told her that he was looking for a wife and said that he would be willing to give her whatever she would like, at which time she walked away. *Id.* Calabro alleges that she then informed her manager about the encounter, claiming that it made her feel extremely uncomfortable, and she noted that other UREC employees had also experienced uncomfortable interactions with Armstrong. *Id.*

The FOIA documents also include Robinson's account of his interview with Armstrong. *Id.* at 1–3. The report generally reflects Calabro's description of events, and it states that when Robinson asked Armstrong about these allegations Armstrong did not deny them. *Id.* The report further indicates that Armstrong did not believe his actions were inappropriate, that he felt it was his "religious right" to have a much younger wife, and that he claimed there was a "horde of misbehaving females" on JMU's campus who were too sensitive to being approached by older men. *Id.* at 2. It states, contrary to Armstrong's allegations, that Robinson told him that his actions were considered sexual harassment. *Id.* Armstrong denies the accuracy of Calabro's statements and the report. Compl. 40.

In addition, the FOIA documents include a report of an interview between Estes and Sirocky-Meck, the Associate Director of the University Health Center. Pl. Br. ex. 1, at 25–28. According to the report, Calabro approached Estes after her encounter with Armstrong, and from Calabro's description of his behavior, Estes immediately knew whom she was talking about. *Id.* at 25. Estes then reported that she had experienced similar conversations with Armstrong when

she was an undergraduate, noting that Armstrong would compliment her on her appearance and ask her on dates and that this interfered with Estes's ability to do her job. *Id.* at 25–26. When asked what outcome she would prefer, Estes replied that she would like for Armstrong's UREC membership to be revoked. *Id.* at 27. In his Complaint, despite claiming that Estes's account was untrue, Armstrong concedes that he had previously interacted with her and had shown an interest in her. Compl. 51. He concludes, however, that Estes was motivated to speak out against him because she felt "scorned" once he turned his affections to Calabro. *Id.*

Based on these allegations, Armstrong brings a variety of claims against the Defendants, including discrimination, fraud, defamation, "breach of public trust," retaliation, conspiracy, invasion of privacy, violation of free speech, sexual harassment, infliction of emotional distress, denial of due process, "deprivation of rights under color of law," and denial of equal protection. *Id.* at 11–41. He also challenges the constitutionality of several aspects of Title IX. *Id.* at 41–43. He seeks $46,000,000 in damages, along with injunctive relief, primarily in the form of punishment of the Defendants, reinstatement of his UREC privileges, and institution of new sexual harassment policies at JMU. *Id.* at 43–44.

II. Motions to Dismiss

Defendants move to dismiss Armstrong's Complaint for failure to state a claim upon which relief can granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See* Defs. Br. 1, ECF No. 8.[7] In addition, under a defense of sovereign immunity, they move to

[7] Calabro, who had not been served by the time the other Defendants moved to dismiss, *id.* at 1 n.1, filed a separate motion, ECF No. 11, and brief, ECF No. 12. For purposes of simplicity, I will not cite separately to the arguments in her brief, as they are not meaningfully different from those asserted by the other Defendants.

dismiss claims asserted against JMU and against the individual Defendants in their official capacities for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1).[8] *See generally id*.

A Rule 12(b)(1) motion challenges a court's subject matter jurisdiction to hear a claim. The plaintiff bears the burden of proving subject matter jurisdiction. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). In resolving a Rule 12(b)(1) motion, "the district court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Id.* (quoting *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991)). A court should grant the motion "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.*

Meanwhile, in order to survive a motion to dismiss under Rule 12(b)(6), a complaint must "state[] a plausible claim for relief" that "permit[s] the court to infer more than the mere possibility of misconduct." *Ashcroft v. Iqbal,* 556 U.S. 662, 679 (2009). In making this determination, the Court accepts as true all well-pled facts and construes those facts in the light most favorable to the plaintiff. *Philips*, 572 F.3d at 180. The Court need not accept legal conclusions, formulaic recitation of the elements of a cause of action, or "bare assertions devoid of further factual enhancements," however, as those are not well-pled facts for Rule 12(b)(6)'s purposes. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (citing *Iqbal*, 556 U.S. at 678).

Plaintiffs must plead enough facts to "nudge[] their claims across the line from conceivable to plausible," and a court should dismiss a complaint that is not "plausible on its

[8] "Although subject matter jurisdiction and sovereign immunity do not coincide perfectly, there is a recent trend among the district courts within the Fourth Circuit to consider sovereign immunity under Rule 12(b)(1)." *Trantham v. Henry Cty. Sheriff's Office*, No. 4:10cv58, 2011 WL 863498, at *3 (W.D. Va. Mar. 10, 2011) (citations omitted).

face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. Federal courts have an obligation to construe pro se pleadings liberally, so that any potentially valid claim can be fairly decided on its merits rather than the pro se litigant's legal acumen. *Rankin v. Appalachian Power Co.*, No. 6:14cv47, 2015 WL 412850, at *1 (W.D. Va. Jan. 30, 2015) (citing *Boag v. MacDougall,* 454 U.S. 364, 365 (1982)). Still, "a *pro se* plaintiff must . . . allege facts that state a cause of action, and district courts are not required 'to conjure up questions never squarely presented to them.'" *Considder v. Medicare*, No. 3:09cv49, 2009 WL 9052195, at *1 (W.D. Va. Aug. 3, 2009) (quoting *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985)), *aff'd*, 373 F. App'x 341 (4th Cir. 2010).

A. Sovereign Immunity

The Defendants contend that any claims Armstrong asserts under § 1983 or Virginia law[9] against JMU and its employees in their official capacities[10] are barred by sovereign immunity under the Eleventh Amendment. Defs. Br. 5–6. The Eleventh Amendment provides the states immunity against suits brought in federal court. *Bland v. Roberts*, 730 F.3d 368, 389 (4th Cir. 2013). In addition to immunizing the states themselves, Eleventh Amendment sovereign

[9] The Defendants do not raise an immunity defense against Armstrong's federal statutory claims, including those asserted under Title IX. It is unlikely that they would be able to avail themselves of an immunity defense with respect to the Title IX claims. *See Litman v. George Mason Univ.*, 186 F.3d 544, 557 (4th Cir. 1999) (finding that a state university waives Eleventh Amendment immunity against Title IX suits by accepting federal funding); *see also Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 97 n.2 (4th Cir. 2011) ("JMU is a state-sponsored university in Virginia that has received and continues to receive federal funds.").

[10] Armstrong does not specify whether he is bringing suit against the individual Defendants in their official or individual capacities. Because the Defendants have challenged all claims against them in their official capacities, I will address this argument as though Armstrong explicitly asserted his claims against the Defendants in both their individual and official capacities.

immunity also extends to state agencies, *McCray v. Md. Dep't of Transp.*, 741 F.3d 480, 483 (4th Cir. 2014) (citing *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997)), and to state officials sued in their official capacities, *see Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the state itself." (citations omitted)). Eleventh Amendment immunity affords full protection to states and state agencies from claims for injunctive or monetary relief. *McCray*, 741 F.3d at 483 (citing *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363–64 (2001)). State officials sued in their official capacities are also protected from claims for monetary damages, but a court may still issue prospective, injunctive relief against an official in order to prevent ongoing violations of federal law. *Bland*, 730 F.3d at 390–91.

JMU, a "public institution of higher education," *see* Va. Code Ann. § 23.1-100, is an instrumentality of the Commonwealth of Virginia and thus falls within the protections of the Eleventh Amendment. *Gordon v. James Madison Univ.*, No. 5:12cv124, 2013 WL 2297186, at *1, *4 (W.D. Va. May 24, 2013); *see also Demuren v. Old Dominion Univ.*, 33 F. Supp. 2d 469, 475 (E.D. Va. 1999) (concurring with the rulings of other circuits, which have found that "state colleges and universities are agents of the state, and thus immune from suit under the Eleventh Amendment"). This protection also extends to employees of public universities sued in their official capacities. *Herron v. Va. Commonwealth Univ.*, 366 F. Supp. 2d 355, 364 (E.D. Va. 2004). For these reasons, I recommend that all claims brought under § 1983 and Virginia law against JMU, along with all such claims seeking monetary damages against the other Defendants in their official capacities, be dismissed with prejudice.

B. Failure to State a Claim

Armstrong brings his claims under a multitude of federal and state constitutional provisions, statutes, and common law theories. Many of these do not actually provide him with a right of action. Furthermore, as to those causes of action that are recognized, Armstrong has failed to state a claim upon which relief can be granted.

1. Discrimination

Armstrong alleges discrimination by most of the Defendants on the basis of gender, religion, and age, in violation of federal law. He asserts his claims against Calabro, Estes, Sirocky-Meck, Golson, Nickel, Bobbitt, Robinson, and JMU, pursuant to the Free Exercise Clause of the First Amendment; the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 268 (1964);[11] the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101–6107; and Title IX. Compl. 11, 15–16, 21, 26, 30–31, 34. As the basis of his claims, Armstrong contends that Calabro and Estes were motivated to submit unfounded complaints of sexual harassment against him because they were prejudiced against his gender, age, and religious beliefs. *Id.* at 11, 16. He alleges that the remaining Defendants sympathized with these biases, conspired with Calabro and Estes, or are otherwise culpable on the basis of their managerial role and/or on a theory of respondeat superior. *Id.* at 21, 26, 31, 34.

a. Free Exercise of Religion

The Free Exercise Clause "forbids the adoption of laws designed to suppress religious beliefs or practices unless justified by a compelling governmental interest and narrowly tailored to meet that interest." *Booth v. Maryland*, 327 F.3d 377, 380 (4th Cir. 2003). This protection thus

[11] Armstrong does not cite to a specific provision of the Civil Rights Act, but he does refer to the Act's prohibition against "discrimination on the basis of religion or sex in public accommodations." Compl. 11, 16, 21, 26, 31, 34. I will therefore construe his Complaint as asserting a claim under Title II of the Civil Rights Act, 42 U.S.C. § 2000a, *et seq.*, which relates to discrimination in places of public accommodation.

guards against "[o]fficial action that targets religious conduct for distinctive treatment." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). By contrast, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)). "[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye*, 508 U.S. at 531.

Armstrong does not identify any particular law or policy that targets his religion as such.[12] Rather, he claims that the Defendants took punitive, official action against him because they were personally motivated by prejudice against his beliefs. *Cf. Shrum v. City of Coweta*, 449 F.3d 1132, 1140–42 (10th Cir. 2006) (finding that the Free Exercise Clause applies to governmental action, not just legislation). He has not alleged sufficient facts to make this showing, however. Armstrong does not claim, for instance, that the Defendants would have reacted to his conduct any differently had he not expressed his religious beliefs. *Cf. Booth*, 327 F.3d at 380–82 (finding that the plaintiff employee sufficiently alleged that the defendant employer had acted with discriminatory intent by punishing him for wearing a religious hairstyle that did not comply with grooming standards, despite having previously granted religious exemptions from the grooming policy to other employees). Instead, he merely states in a

[12] Arguably, Armstrong's Complaint can be read as challenging Title IX itself on the grounds that it unreasonably inhibits the free exercise of his religion. *See* Compl. 41. He does not, however, identify any particular provision of that statute as being facially discriminatory or allege any facts suggesting that it was enacted with discriminatory intent. *See infra* Part II.B.1.d.iv. Instead, he merely alleges that it incidentally interferes with his freedom to pursue relationships with younger women—as is prescribed by his religion—in the manner he chooses. This is insufficient to raise a challenge on Free Exercise grounds.

conclusory manner that the Defendants targeted him for punishment on the basis of religion. Such "bare assertions" are insufficient to show discriminatory intent. *See Iqbal*, 556 U.S. at 680–81. Furthermore, Armstrong has not alleged that revoking his UREC privileges for propositioning a student-employee substantially burdened his sincerely held religious beliefs. Therefore, he has failed to state a claim for violation of his right to free exercise of religion, and his claim should be dismissed.

b. Civil Rights Act

Title II of the Civil Rights Act of 1964 ("Title II") forbids certain types of discrimination in "any place of public accommodation." 42 U.S.C. § 2000a(a). As the language of the statute makes clear, Title II only addresses discrimination or segregation on the basis of "race, color, religion, or national origin." *Id.* Thus, Armstrong's allegations of discrimination based on his age and sex are not properly brought under Title II. *See, e.g.*, *Adamore v. Southwest Airlines Corp.*, Civil Action No. H-11-0564, 2011 WL 6301398, at *5 n.25 (S.D. Tex. Dec. 15, 2011) (explaining that Title II "does not list sex or age as prohibited grounds" of discrimination); *Jackson v. Tyler's Dad's Place, Inc.*, 850 F. Supp. 53, 55 (D.D.C. 1994) (noting that Title II "does not proscribe discrimination on the basis of sex").

In order to state a claim for religious discrimination under Title II, Armstrong must show that he was intentionally subjected to segregation or deprived of services on account of his religion. *See Akiyama v. U.S. Judo, Inc.*, 181 F. Supp. 2d 1179, 1184–87 (W.D. Wash. 2002) (reasoning that Title II requires a showing of intentional discrimination by the defendant, rather than the application of neutral policies that incidentally impact religious adherents); *see also Fall v. LA Fitness*, 161 F. Supp. 3d 601, 607 (S.D. Ohio 2016) (finding no violation of Title II stemming from refusal to allow plaintiff to pray at a certain location in defendant's gym because

plaintiff, a Muslim, had not shown that non-Muslim gym members were permitted to pray at that location). As explained above, Armstrong has failed to allege facts showing that the Defendants intentionally discriminated against him on the basis of his religion. I therefore find that Armstrong's claims under Title II of the Civil Rights Act should be dismissed.

c. Age Discrimination Act

The Age Discrimination Act of 1975 ("ADA") provides that "no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance." 42 U.S.C. § 6102.[13] A recipient of federal funds may not "use age distinctions or take any other actions which have the effect, on the basis of age, of . . . [d]enying or limiting individuals in their opportunity to participate in" a federally funded program or activity. 45 C.F.R. § 90.12(b)(2). Armstrong has not alleged plausible facts showing that his UREC privileges were revoked "on the basis of [his] age," *Wheat v. Mass*, 994 F.2d 273, 276 (5th Cir. 1993), rather than on the basis of his unsolicited propositioning of a student-employee and the concerns that conduct spawned. Accordingly, the ADA claim should be dismissed for failure to state a claim.

d. Title IX

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Individuals who are subjected to sex discrimination may enforce Title IX through an implied private right of action, *Doe v. Washington & Lee Univ.*, No. 6:14cv52, 2015 WL 4647996, at *9

[13] The ADA provides a limited private right of enforcement that is confined to injunctive relief against the entity that receives federal funds. *See Tyrrell v. City of Scranton*, 134 F. Supp. 2d 373, 381–84 (M.D. Pa. 2001).

(W.D. Va. Aug. 5, 2015) (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688–89 (1979)), but such an action may not be brought against school officials in their individual capacities, *see Bracey v. Buchanan*, 55 F. Supp. 2d 416, 419 (E.D. Va. 1999) (collecting cases). Thus, Armstrong's Title IX claims against the Defendants in their individual capacities should be dismissed with prejudice.

i. Discriminatory Discipline

Assuming, without deciding, that Armstrong's use of UREC facilities is covered by Title IX,[14] his claim of discrimination in the decision to revoke his UREC membership should be evaluated under the standards set out in *Yusuf v. Vassar Coll.*, 35 F.3d 709 (2d Cir. 1994). *See Washington & Lee Univ.*, 2015 WL 4647996, at *9 (stating that *Yusuf* provides the format for a claim in which "a student challenges the outcome of a school disciplinary proceeding under Title IX").[15] In *Yusuf*, the Second Circuit explained,

[14] None of the parties have briefed this issue. At oral argument, the Defendants argued that Armstrong is not protected by Title IX because he was not a student at JMU and because UREC's operations are unrelated to JMU's educational mission, but it is unclear whether this argument is entirely correct. Under Title IX, a covered "program or activity" includes "all of the operations of . . . a college, university, or other postsecondary institution," 20 U.S.C. § 1687(2)(A), and thus would presumably include UREC. In addition, the broad language of Title IX, which provides that "[n]o person" may be discriminated against on the basis of sex, *id.* § 1681(a), would seem to include protections for any individual who is subjected to such discrimination by a covered program or activity. Moreover, the Department of Education's Office for Civil Rights maintains that "Title IX protects all persons from discrimination, including parents and guardians, students, and employees." *Sex Discrimination: Frequently Asked Questions*, U.S. Dep't of Educ. Office for Civil Rights, https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/sex.html (last modified Jan. 24, 2017). This position arguably is broad enough in its sweep to include alumni as well. *But see Lopez v. San Luis Valley, Bd. of Coop. Educ. Servs.*, 977 F. Supp. 1422, 1425–26 (D. Colo. 1997) (finding that Title IX's coverage extended only to students and school employees). Although extending Title IX's protections to an alumnus's participation in recreational activities appears to stretch the outer limits of the law, it is not necessary to resolve the question of coverage with certainty here because, for the reasons explained *infra*, Armstrong still fails to state a claim for relief under Title IX.

[15] By applying the framework set out in *Yusuf*, I do not suggest that revocation of an alumnus's recreation membership rises to the same level of seriousness as the disciplinary proceedings at issue in that case and its progeny, which generally relate to the suspension or expulsion of enrolled students based on charges of sexual misconduct.

> Plaintiffs attacking a university disciplinary proceeding on grounds of gender bias can be expected to fall generally within two categories. In the first category, the claim is that the plaintiff was innocent and wrongly found to have committed an offense. In the second category, the plaintiff alleges selective enforcement. Such a claim asserts that, regardless of the [plaintiff's] guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the [plaintiff's] gender. Plaintiffs may plead in the alternative that they are in both categories, but in neither case do wholly conclusory allegations suffice for purposes of Rule 12(b)(6).

35 F.3d at 715 (citation omitted). Armstrong's Complaint does not support a claim for selective enforcement, as he has failed to allege that "a female was in circumstances sufficiently similar to his own and was treated more favorably" by JMU. *Mallory v. Ohio Univ.*, 76 F. App'x 634, 641 (6th Cir. 2003). Thus, the Court will evaluate his claim under the "erroneous outcome" framework.

In order to state a claim under a theory of erroneous outcome, Armstrong "must allege particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding," along with "particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding." *Yusuf*, 35 F.3d at 715. As to the first of these factors, it is exceedingly difficult to ascertain the basis for Armstrong's claim that the Defendants' decision to revoke his UREC membership was made in error. He variously challenges the Defendants' statements of historical fact and insists that his conduct could not reasonably be construed as offensive or discomforting,[16] oftentimes blurring the lines between these arguments.

[16] The Court does not credit Armstrong's insistence that conversations with UREC employees regarding sexual or romantic topics, even if they are made in a respectful tone, are appropriate for that setting. Such an assertion is not factual, but rather is a conclusion. Furthermore, the extensive commentary in Armstrong's Complaint and brief, which is shot through with sexual stereotypes, innuendo, and demeaning comments directed towards Calabro and Estes, does not in any way show respect for UREC's female staff.

Although Armstrong at times categorically denies all of the allegations contained in Robinson's written report and in records of Calabro and Estes's complaints, many of those allegations are actually consistent with Armstrong's own claims. He does not dispute that he brought up the subject of marriage with Calabro while she was working, and he admits that he had previously discussed romantic topics with Estes in the same setting. In some instances, Armstrong refutes the Defendants' accusations regarding his behavior with distinctions that seem meaningless or illogical. For example, he argues that Calabro's claim that he offered her a farm and "as many babies as [she'd] like" was false because he "made no direct proposal to Calabro of such a situation, only a theoretical one," Pl. Br. 21, and contrary to his own admissions, claims that he never asked Estes or Calabro for a date or proposed marriage to either of them, *id.* at 22. At other points, Armstrong seems to justify his withholding of factual contentions or explanations because he seeks to use these to ambush the Defendants at trial, *see id.* at 13, 16, 23, a tactic that is at odds with the purpose of notice pleading, *see Twombly*, 550 U.S. at 555 n.3 ("Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests."). Although Armstrong quibbles with some of the details, he readily admits that he made unsolicited advances on two student-employees at the UREC facility. Thus, even under the liberal pleading standards that apply in light of Armstrong's pro se status, he has not coherently stated his reasons for challenging the accuracy of the decision to revoke his UREC membership.

Likewise, Armstrong's claim that an erroneous outcome was the result of procedural irregularities rings hollow. A Title IX claimant may challenge the accuracy of a disciplinary proceeding by "alleg[ing] particular procedural flaws affecting the proof." *Yusuf*, 35 F.3d at 715.

Armstrong contends that he was entitled to the process established in the JMU Student Handbook, which guarantees students procedural safeguards such as the right of the accused to see the evidence against him, present witness testimony at a formal hearing, and appeal an adverse ruling. *See* Compl. 50–51; Pl. Br. 16, 18; *see also* Pl. Br. ex. 2, ECF No. 17-2 (copy of JMU Student Handbook procedures). Although a claim may be successfully stated under an erroneous outcome theory based on the failure of university officials "to act in accordance with [u]niversity procedures designed to protect accused students," *Doe v. Columbia Univ.*, 831 F.3d 46, 56–57 (2d Cir. 2016), here Armstrong has not given any indication (other than by wholly conclusory assertions) that these procedures would apply to disciplinary actions against non-students such as himself.

More critically, even if Armstrong had adequately alleged that his expulsion from UREC was erroneous or that he was subjected to selective enforcement, he has not pled specific facts that would give rise to an inference that JMU's actions were the result of gender bias. "[A]llegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to dismiss." *Yusuf*, 35 F.3d at 715. Rather, a showing of discrimination requires the pleading of particular facts, such as "statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender." *Id.*; *see also Columbia Univ.*, 831 F.3d at 57 (finding sufficient support for an inference of university officials' bias against accused male students based on plaintiff's allegations that officials had displayed sensitivity to criticisms of their handling of previous sexual assault accusations by female students against male students); *Washington & Lee Univ.*, 2015 WL 4647996, at *10 (finding that plaintiff sufficiently alleged

gender bias on the part of a university official who had endorsed a view that characterized men's participation in objectively consensual sexual encounters as assault).

In this case, Armstrong has not alleged any statements or actions by the Defendants that give rise to an inference of gender bias. Instead, he simply alleges, without any support (other than Calabro's description of him as an "elder male," Pl. Br. 19), that the Defendants were motivated by an ingrained societal prejudice against older men seeking younger wives. *See* Compl. 10, 47, 49, 51; Pl. Br. 19–20. Armstrong admits that he cannot allege direct facts showing that the Defendant's were motivated by gender bias, Pl. Br. 19–20, and he also fails to raise any facts that would provide circumstantial proof of his claim. Moreover, Armstrong's focus on the Defendants' alleged views regarding the age disparity between himself and Calabro—which, it should be noted, is appropriate to consider in determining whether conduct amounts to harassment, *see Jennings v. Univ. of N.C.*, 482 F.3d 686, 697 (4th Cir. 2007) (en banc)—sidesteps the necessary issue of gender discrimination, as he does not allege that an older female who engaged in similar conduct with a much younger male would not be subjected to similar discipline. His Title IX claim for discriminatory discipline should therefore be dismissed.

ii. Retaliation

Armstrong also claims that each of the Defendants retaliated against him in violation of Title IX. Compl. 13, 18, 24, 28, 32, 37, 39. "Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005). In order to state a claim for retaliation under Title IX, a plaintiff must show "(1) engagement in a protected activity; (2) an adverse action; and (3) a causal connection between the protected activity and the adverse action." *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 769

(D. Md. 2015) (citing *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010)).[17] To the extent Armstrong alleges that the Defendants retaliated against his filing a Title IX claim with the OEO by moving forward with Calabro's claim against him, he has failed to allege an adequate causal connection. Armstrong has not stated any facts that would suggest that the principal complainants in the claim against him were even aware that he had filed a counterclaim. Such an assertion would be unreasonable in any case, as Calabro brought her complaint against Armstrong before he brought his complaint against her.

In addition, to the extent Armstrong alleges that individuals in the OEO retaliated against him by "obstructing" his complaint, this would also fail because his allegations of obstruction are trivial. Even assuming that officials in that office had actually received Armstrong's complaint and deliberately delayed acting on it, Armstrong still acknowledges that Robinson had asked him about this complaint within a month of it being filed. He does not allege that he followed up on this communication or ever made another attempt to bring his claim forward. A delay of a few weeks, followed by Armstrong's seeming refusal to take any further action once he had the opportunity to do so, is simply too insubstantial to be truly adverse. *See Salisbury Univ.*, 123 F. Supp. 3d at 769 (noting that the adverse action must be "material," rather than mere "petty slights or minor annoyances" (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)). For these reasons, Armstrong's Title IX retaliation claim should be dismissed.

iii. Sexual Harassment

Armstrong also brings claims for sexual harassment pursuant to Title IX. Compl. 15, 30, 34. Under Title IX, sexual harassment may be actionable if it is "sufficiently severe or pervasive

[17] Observing that the Fourth Circuit has not spoken directly on retaliation claims brought pursuant to Title IX, the court in *Salisbury University* followed the judicial framework for retaliation claims brought under Title VII of the Civil Rights Act, which provides persuasive guidance for Title IX claims under analogous circumstances. *See id.* at 769 & n.11.

to create a hostile (or abusive) environment in an educational program or activity." *Jennings*, 482 F.3d at 695. Armstrong contends that a hostile environment existed at UREC because female employees, including Calabro, wore "sexually enticing" and "provocative" attire and did not clearly communicate their disinterest in him, yet complained of improper conduct when he discussed romantic or sexual topics with them. *See, e.g.*, Compl. 15. This argument is completely meritless. "The gravamen of any sexual harassment claim is that the alleged [conduct was] 'unwelcome.'" *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986). Here, Armstrong never alleges that he found Calabro's attire to be offensive or otherwise inappopriate; quite the contrary, he states that he found it highly appealing. Furthermore, he does not claim that Calabro initiated any of their interactions or directed her attention towards him. Instead, he claims that Calabro, simply by "her habit, manner and mode of being," practically left him with no choice but to make advances. Compl. 49. Armstrong cannot argue that he was subjected to a hostile environment because he was unable to control his urges and thus engaged in conduct that Calabro found objectionable and subsequently reported to her managers. His claim for sexual harassment therefore should be dismissed.

iv. Constitutional Challenge

In addition to the claims he brings under Title IX, Armstrong also separately challenges the constitutionality of Title IX. Compl. 41–43. The majority of the grounds for Armstrong's challenge are unrelated to his constitutional rights. To the extent he alleges that Title IX is unconstitutionally vague, violates his right to due process, and infringes upon his free exercise of religion, Armstrong's challenge is misplaced, as Title IX does not mandate any of the policies or procedures of which he complains. Instead, any challenged policies and procedures, which

Armstrong has failed to identify with specificity, would be found in JMU's code of conduct. Accordingly, his constitutional challenge to Title IX should be dismissed.

2. Due Process

Armstrong brings claims for violation of his right to due process against all Defendants other than Calabro, pursuant to the Fifth and Fourteenth Amendments, based upon the allegedly deficient procedures that were applied in adjudicating the charges of misconduct against him. Compl. 16, 21, 26–27, 31, 34–35, 39. The Constitution provides that a State may not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Evaluation of a claim for violation of the right to due process entails a two-step inquiry:

> [T]he reviewing court must first determine if a property or liberty interest has been sufficiently alleged to determine whether constitutionally protected process is due. If one or both has been sufficiently alleged, then the court must determine whether the plaintiff has sufficiently alleged that the process he received was constitutionally inadequate.

Doe v. Alger, 175 F. Supp. 3d 646, 656 (W.D. Va. 2016) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 569–71 (1972); *Shirvinski v. U.S. Coast Guard*, 673 F.3d 308, 314 (4th Cir. 2012)).

Armstrong's Complaint may be read as arguing that he was deprived of a constitutionally protected liberty interest in his reputation and a protected property interest in his UREC membership. In *Doe v. Alger*, U.S. District Judge Elizabeth K. Dillon considered the due process claims of a JMU student, "John Doe," who was suspended from the university after being found guilty of sexual misconduct by JMU officials. *See generally id.* The Court first addressed whether Doe had a constitutionally protected property interest in his continued enrollment at JMU. *Id.* at 656–58. Judge Dillon noted that a protected property interest "is not created by a mere 'abstract need or desire for it,'" but rather from "'a legitimate claim of entitlement to it,'" which may "arise from state statutes, contracts, regulations, or policies." *Id.* at 656–57 (quoting

Roth, 408 U.S. at 576–78). Applying this standard, the Court found that although Doe did not identify a statutory right to education at a public university, he could show that he had a legitimate claim of entitlement to continued enrollment by virtue of JMU's adopted policies and practices regarding dismissal of students. *Id.* at 657–58. By alleging that "through its policies and practices," including its student rights policy, "JMU has a system of expelling, suspending, or dismissing students only after a finding of cause," Doe had pled sufficient facts that, if proven, would show that his enrollment at JMU was a protected property interest that could not be taken away without due process. *Id.* at 658.

Here, Armstrong claims that "if membership in UREC is granted to all, it can be denied to none except upon extraordinary grounds and with adequate proofs, given in a procedure that follows a distinct plan of due process." Compl. 10. Unlike the plaintiff in *Alger*, however, Armstrong has not pointed to any actual UREC policy or practice that would give rise to an implied entitlement to continued membership. Furthermore, in comparison to other protected property interests found to exist on the basis of mutual expectations, such as enrollment in a public university, *see Alger*, 175 F. Supp. 3d at 658, renewal of an employment contract, *see Perry v. Sindermann*, 408 U.S. 593, 598 (1972), or continued issuance of a business license, *see Richardson v. Town of Eastover*, 922 F.2d 1152, 1156–58 (4th Cir. 1991), Armstrong's interest in his UREC membership is so grossly insignificant that the Court is skeptical he could ever claim an entitlement deserving of constitutional protection.

As to a protected liberty interest in one's reputation, *Alger* is again instructive. There, the Court acknowledged that Doe had alleged a substantial stigma arising from JMU's finding of responsibility for sexual misconduct, which would be included on his permanent record and shared with other universities. 175 F. Supp. 3d at 658. Nonetheless, this stigma by itself was

insufficient to create a protected liberty interest; instead, Doe needed to allege "a reputation injury (the stigma), accompanied by a state action that distinctly altered or extinguished a legal status or right (the plus)." *Id.* at 660 (citing *Shirvinski*, 673 F.3d at 315; *Doe v. Rector & Visitors of George Mason Univ.*, 132 F. Supp. 3d 712, 721–23 (E.D. Va. 2015)). Furthermore, except in the context of public employment, the legal status or right that is altered or extinguished must have been created by statute. *Id.* (citing *Paul v. Davis*, 424 U.S. 693, 708–11 (1976)). Applying this "stigma plus" standard, the Court found that Doe had not alleged sufficient facts to establish a constitutionally protected liberty interest. *Id.* at 660–61.

Armstrong's case is even less convincing. He has not alleged, except by the barest of assertions, that the Defendants' decision to expel him from UREC would in itself tarnish his reputation, as there is no basis to conclude that this information would be shared with anyone outside of the Defendants themselves. *See Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 312 (4th Cir. 2006) (finding that a statement damaging to one's reputation implicates a liberty interest only if publicly disclosed). Rather, it appears that the only way the information surrounding Armstrong's expulsion was ever made known to the public was through Armstrong's filing this action. Moreover, as with the plaintiff in *Alger*, Armstrong has not identified a statutory status or right that was altered or extinguished as a result of the disciplinary action against him. Thus, because he has not pled facts showing that he was denied a protected property or liberty interest, Armstrong's due process claims should be dismissed.

3. Free Speech

Armstrong brings his claims for violation of his First Amendment right to free speech against all Defendants except Phillips. Compl. 14–15, 19–20, 25, 29, 33, 38. He premises his claim on the assertion that he has a protected right to socialize with women on campus, including

discussion of "personal and even sexual topics," without reprisal from state officials. *See, e.g.*, *id.* at 8–9. The Defendants challenge this claim by arguing that because Armstrong was able to have conversations with Calabro, his speech was never suppressed. Defs. Br. 14–15. The Defendants' argument misses the mark, however, as "[t]he First Amendment right to free speech includes not only the affirmative right to speak, but also the right to be free from retaliation by a public official for the exercise of that right." *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685 (4th Cir. 2000). In order to establish such a claim for retaliation against his right to free speech, Armstrong must show that (1) his speech was protected, (2) the Defendants' alleged retaliatory actions affected his protected speech, and (3) there was a causal relationship between the speech and the retaliatory action. *Id.* at 685–86.

Armstrong's claim here fails because his speech was not protected. Even assuming that Armstrong's conduct could be considered "speech" within the meaning of the First Amendment, *cf. Thorne v. Bailey*, 846 F.2d 241, 243–44 (4th Cir. 1988) (noting that harassment is considered conduct rather than speech), the Defendants were still permitted to take action against him in response. The government retains some discretion to restrict expressive activity on public property, with the latitude of that discretion dependent upon the nature of the property. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983). In "places which by long tradition or by government fiat have been devoted to assembly and debate," or in those places "which the state has opened for use by the public as a place for expressive activity," the government's authority to restrict speech is strictly limited. *Id.* at 45. With regard to "[p]ublic property which is not by tradition or designation a forum for public communication," however, "the state may reserve the forum for its intended purposes, communicative or otherwise, as long

as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* at 46.

Nothing in the pleadings suggests that UREC's facilities should be considered a forum for public communication, either by tradition or by designation. Armstrong has not alleged that UREC serves any functional purpose other than providing a location for physical exercise, and he has not shown any policy or practice by JMU of opening up UREC as a venue for public expression. *Cf. Student Coal. for Peace v. Lower Merion Sch. Dist.*, 776 F.2d 431, 436–37 (3d Cir. 1985) (rejecting argument that school athletic field was a public forum, as it did not exist primarily for expressive activity). Therefore, restrictions on speech at UREC would be permissible so long as they are reasonable and do not discriminate based on the speaker's viewpoint.

Armstrong has not alleged facts showing that the decision to revoke his UREC privileges was based on any particular viewpoint he espoused, as opposed to the sexual and highly personal nature of his conversations with UREC employees and the concern his unsolicited propositions caused those employees. Nor do his pleadings show that the Defendants' restrictions of his speech were unreasonable. Armstrong's conversations were not in any way related to UREC's function as a gym or of a nature that would be expected in such a setting. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985) (noting that the reasonableness of a restriction on speech in a nonpublic forum "must be assessed in the light of the purpose of the forum and all the surrounding circumstances"). Moreover, Armstrong's statements were not simply directed to anyone who cared to listen, but rather to employees who were in their place of work and therefore did not have the option to leave. *See Frisby v. Schultz*, 487 U.S. 474, 487 (1988) ("The First Amendment permits the government to prohibit offensive speech as intrusive

when the 'captive' audience cannot avoid the objectionable speech."); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991) (finding that employees are a captive audience to speech that creates a hostile environment). Thus, because the Defendants's actions were reasonable and did not infringe on protected speech in violation of Armstrong's rights, his First Amendment claims must be dismissed.

4. Equal Protection

Apart from his discrimination claims, Armstrong brings claims against Sirocky-Meck, Golson, Nickel, Bobbitt, Robinson, Phillips, and JMU for violations of his Fourteenth Amendment right to equal protection. Compl. 25, 29, 33, 38, 40–41. The Fourteenth Amendment provides that a State may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. In accordance with this requirement, "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). So far as the Court can tell, Armstrong contends that he was denied equal protection as a result of the Defendants' favoring the complaints of Calabro and Estes over his own allegations on the basis of Calabro and Estes's status as UREC employees. *See, e.g.*, Compl. 25. Such a claim is entirely frivolous because Armstrong was not similarly situated with Calabro and Estes. Rather, he was the subject of an investigation into alleged sexual misconduct, while they were his accusers. *Cf. Scates v. Shenandoah Mem'l Hosp.*, 5:15cv32, 2016 WL 6270798, at *8 (W.D. Va. Oct. 26, 2016) (finding that coworkers who complained of plaintiff's behavior and fought with plaintiff were not similarly situated to plaintiff and employer could resolve an interpersonal dispute between coworkers and plaintiff by assessing the credibility of their complaints). Armstrong's equal protection claims should therefore be dismissed.

5. Invasion of Privacy

Armstrong next complains that the Defendants invaded his privacy, in violation of the Fourth Amendment, by acting upon what he considered to be private conversations with Calabro and Estes. Compl. 14, 19, 25, 29, 33, 37–38, 40. The Fourth Amendment provides protection against unreasonable government intrusions into those areas in which a person has a "reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). Here, Armstrong could not reasonably expect that Calabro and Estes would not recount their conversations with him to third parties. *See Smith v. Cincinnati Post & Times-Star*, 475 F.2d 740, 741 (6th Cir. 1973) (citing *Rathbun v. United States*, 355 U.S. 107, 111 (1957)) ("Each party to a conversation . . . takes the risk that the other party may divulge the contents of that conversation, and should that happen, there has been no violation of the right of privacy."). Accordingly, Armstrong's Fourth Amendment claim for invasion of privacy should be dismissed.

6. Remaining Claims

As to the remainder of Armstrong's federal claims, he has not pointed to any existing federal law that gives him a private right of action. For instance, although he asserts that the Defendants are liable for "deprivation of rights under color of law," such action is merely a requirement to bring suit under § 1983, not a separate cause of action in itself. Likewise, his claim for "breach of public trust" is not a cognizable claim. Armstrong's claim for infliction of emotional distress, which he brings pursuant to the Fourteenth Amendment, does not invoke an actual constitutional right, but rather is a state common law tort.

Armstrong also frequently cites to federal criminal provisions in support of his claims, but does not explain how any of them provide him with a private right of action. Federal criminal statutes are enforced through actions brought by the United States Attorney, 28 U.S.C. § 547, and "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution

of another," *Diamond v. Charles*, 476 U.S. 54, 64 (1986) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)). "A private right of action to enforce a federal law can only be established by Congress, and the judicial duty is only to interpret the statute." *Reinheimer v. Moynihan*, No. 5:14cv49, 2015 WL 3507328, at *8 (W.D. Va. May 1, 2015) (citing *Touche Ross & Co. v. Redington,* 442 U.S. 560, 578 (1979)), *report and recommendation adopted in relevant part*, 2015 WL 3513765 (W.D. Va. June 4, 2015). Therefore, absent clear Supreme Court guidance, a plaintiff cannot bring a civil claim for violation of a criminal statute. *Id.* (citing *Cannon*, 441 U.S. at 668).

Other courts have found that the criminal statutes Armstrong cites do not provide a private right of action. *See Abou-Hussein v. Gates*, 657 F. Supp. 2d 77, 81 (D.D.C. 2009) (finding that there was no private action to bring claims for fraud under 18 U.S.C. § 1001, or for conspiracy under 18 U.S.C. § 241); *Figueroa v. Clark*, 810 F. Supp. 613, 615 (E.D. Pa. 1992) (finding no private cause of action to enforce 18 U.S.C. § 242 for criminal violations of civil rights). Another provision Armstrong cites, 28 U.S.C. § 4101, relates to the recognition of judgments in defamation claims rendered by foreign courts and is therefore inapplicable here.

Finally, the Court must consider whether to exercise jurisdiction over the claims Armstrong has brought under state law. A court has supplemental jurisdiction over claims that are so related to the other claims forming the basis of the court's original jurisdiction so as to create the same case or controversy. 28 U.S.C. § 1367(a). A court may decline to exercise supplemental jurisdiction where it has dismissed all of the claims that provided its original jurisdiction. 28 U.S.C. § 1367(b). I have found that all of Armstrong's claims that could provide federal question jurisdiction fail to state a claim upon which relief may be granted, and because Armstrong and most of the Defendants are Virginia citizens, diversity of citizenship likewise

does not provide a basis for jurisdiction, *see* 28 U.S.C. § 1332. Armstrong's only remaining claims are premised on state law, and this case is in the early stages. Under these circumstances, I recommend that the Court decline to exercise supplemental jurisdiction over Armstrong's state law claims and leave them for resolution in the state courts, should he so choose. *See Shanaghan v. Cahill*, 58 F.3d 106, 109–10 (4th Cir. 1995).

III. Conclusion

The claims in Armstrong's Complaint, ECF No. 1, fail to state a cause of action for which the Court can grant relief, and they should be dismissed under Rule 12(b)(1) and (6). I recommend that the presiding District Judge **DISMISS WITH PREJUDICE** all claims brought under § 1983 and under state law against JMU and all such claims for damages against the other Defendants in their official capacities, as these Defendants are protected by absolute immunity. I further recommend that the presiding District Judge **DISMISS WITH PREJUDICE** all claims brought under Title IX against the Defendants in their individual capacities, as they are categorically exempt from liability under that statute. As to Armstrong's remaining claims, I recommend that the presiding District Judge **DISMISS** these claims **WITHOUT PREJUDICE** on the basis of Armstrong's failure to state a claim upon which relief can be granted. Furthermore, because I recommend that the Complaint be dismissed in its entirety, Armstrong's motion for discovery, ECF No. 17, at 14–16, is **DENIED**.

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(C):

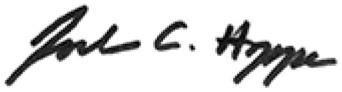
> Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings

or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Failure to file timely written objections to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14 day period, the Clerk is directed to transmit the record in this matter to the Honorable Michael F. Urbanski, United States District Judge.

The Clerk shall send certified copies of this Report and Recommendation to all counsel of record and unrepresented parties.

ENTER: February 23, 2017



Joel C. Hoppe
United States Magistrate Judge